Supreme Court, U.S.
FILED
FEB 11 1993
OFFICE OF THE CLERK

No. 92-1217

In the
Supreme Court of the United States

OCTOBER TERM, 1992

COOL LIGHT COMPANY, INC.,
Petitioner,

v.

GTE PRODUCTS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

ALLAN VAN GESTEL
(Counsel of Record)
JOHN B. DAUKAS
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, Massachusetts 02109-2881
(617) 570-1000
Counsel for Respondent

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

Table of Contents.

	Page
TABLE OF AUTHORITIES.	ii
I. INTRODUCTION.	1
II. STATEMENT OF THE CASE.	2
III. ARGUMENT.	5
It Would Be Improvident To Grant Certiorari As Petitioner Is Not Entitled To Any Further Or Different Relief Below Even If It Could Prevail On The Merits Of Its Argument To This Court	5
A. A Separate And Unchallenged Basis Exists Which Supports The Contested Decision	7
B. The Court Should Not Reinstate The Jury Verdicts Because Either: (a) The Lower Courts Have Found That The Jury Verdicts Are Against The Clear Weight Of The Evidence And Demonstrate Juror Confusion; Or (b) Respondent Is Entitled To But Has Not Yet Received A Ruling By The Trial Court On Its Motion to Set Aside The Jury Verdicts As Against The Clear Weight Of The Evidence	9
C. The Court Should Not Reinstate Demonstrably Erroneous Jury Verdicts	11
CONCLUSION.	12
APPENDIX.	B.1

Table of Authorities.

Cases

	Page
Belcher v. *Stengel*, 429 U.S. 118 (1976)	6
Christianson v. *Colt Industries Operating Corp.*, 486 U.S. 800 (1988)	8
Cool Light Company, Inc. v. *GTE Products Corporation*, 973 F.2d 31 (1st Cir. 1992)	3, 4, 6, 7, 8, 11
Fogel v. *Chestnutt*, 668 F.2d 100 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982)	9, 11
Hatch v. *Reliance Ins. Co.*, 758 F.2d 409 (9th Cir.), 474 U.S. 1021 (1985)	8
Helvering v. *Gowran*, 302 U.S. 238 (1937)	7
Jackson v. *Southern California Gas Co.*, 881 F.2d 638 (9th Cir. 1989)	7
Klingman v. *Levinson*, 877 F.2d 1357 (7th Cir. 1989)	7
Knight v. *Mills*, 836 F.2d 659 (1st Cir. 1987)	8
Lacy v. *Gardino*, 791 F.2d 980 (1st Cir.), *cert. denied*, 479 U.S. 888 (1986)	8
Laffey v. *Northwest Airlines, Inc.*, 740 F.2d 1071 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1181 (1985)	9, 11
Marshall v. *Lonberger*, 459 U.S. 422 (1982)	10
The Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180, (1959)	6
Munoz v. *Imperial County*, 667 F.2d 811 (9th Cir.), *cert. denied*, 459 U.S. 825 (1982)	9, 11
Muskrat v. *United States*, 219 U.S. 346 (1911)	6
National Labor Relations Board v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960)	6

	Page
New York v. *Uplinger*, 467 U.S. 246 (1984)	6
Railway Labor Executives Ass'n v. *Staten Island R. Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)	8
Somerville v. *United States*, 376 U.S. 909 (1964)	6
United States v. *Oregon Medical Society*, 343 U.S. 326 (1952)	10
Williamsburg Wax Museum, Inc. v. *Historic Figures, Inc.*, 810 F.2d 243 (D.C. Cir. 1987)	8, 11

Federal Rules of Civil Procedure

Fed. R. Civ. P. 9(b)	4
Fed. R. Civ. P. 49	7
Fed. R. Civ. P. 50	10
Fed. R. Civ. P. 59	10
Fed. R. Civ. P. 60	5

Rules of the Supreme Court

15	1
29:1	1

Miscellaneous

J. Moore, J. Lucas & T. Currier, 1B Moore's Federal Practice (1992)	9
R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice (6th Ed. 1986)	6

In the

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1217

COOL LIGHT COMPANY, INC.,
Petitioner,

v.

GTE PRODUCTS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Introduction.

GTE Products Corporation ("Respondent")[1] files this brief pursuant to Rule 15 of the Rules of the Supreme Court of the

---

[1] On January 29, 1993, Respondent was purchased by Osram GmbH and changed its name to Osram Sylvania, Inc. Pursuant to Rule 29:1 of the Rules of this Court,

United States in opposition to the petition for a writ of certiorari of petitioner Cool Light Company, Inc. ("Petitioner"). Though Respondent vigorously maintains that the First Circuit Court of Appeals' decision from which Petitioner seeks relief — a decision upholding the independent rulings of two respected district court judges — is correct, it will not here address the merits of that decision. Instead, Respondent asks this Court to deny the petition because the status and procedural posture of this case are such that resolution of the issues raised by Petitioner would not entitle it to any relief and would be irrelevant to the ultimate outcome of this action.

Statement of the Case.

The parties initially tried this action to a judge (McNaught, J.) and jury in the spring and early summer of 1990. Judge McNaught found in favor of Respondent on all five counts tried to the bench. Transcript, June 29, 1990 (Findings, McNaught, J.), A-39 through A-43; Final Judgment, December 11, 1991 (Keeton, J.), A-68 through A-69.[2] The jury returned a verdict in favor of Petitioner on three out of six counts brought by Petitioner and awarded it compensatory damages on each of the three counts and substantial punitive damages under Cali-

---

respondent states as follows: Osram Sylvania, Inc. is a Delaware corporation which is a wholly-owned subsidiary of Osram GmbH, which is a wholly-owned subsidiary of Siemens A.G. Osram Sylvania, Inc. does not have any non-wholly owned subsidiaries. Prior to January 29, 1993, GTE Products Corporation was a wholly-owned subsidiary of GTE Products of Connecticut Corporation, a Connecticut corporation. GTE Products of Connecticut Corporation is a wholly-owned subsidiary of GTE Corporation, a New York corporation. For simplicity sake, Osram Sylvania, Inc. will be referred to herein as "GTE Products Corporation" or "Respondent."

[2] Exhibits identified as "A. " are attached to Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit ("Petition") and not reprinted here. To avoid confusion, the page references to exhibits provided by Respondent are identified as "B. " and appended hereto.

fornia law. Jury Verdict Forms, A. 11 through A. 20. Respondent moved for judgment notwithstanding the verdict, and, in the alternative, for a new trial on the grounds, among others, that the verdict was against the clear weight of the evidence, that the jury made multiple awards for the same claimed injury, and that California law permitting punitive damages should not apply. Defendant GTE Products Corporation's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, Motions for New Trial and Remittitur, B. 1 through B. 2.

On August 9, 1990, Judge McNaught ordered a new trial on all counts tried to the jury, including those on which the verdicts went against the Petitioner. Memorandum and Order, August 9, 1990 (McNaught, J.), A. 21 through A. 24. Contrary to Petitioner's assertion, Petition at 6, and as noted by both the Court of Appeals and Judge Keeton (the district court judge who presided at the retrial), Judge McNaught's decision to grant a new trial was *not* based solely on concerns over the calculation and apportionment of compensatory damages, but was also driven by additional concerns about the verdicts. *Cool Light Company, Inc.* v. *GTE Products Corporation*, 973 F.2d 31 (1st Cir. 1992), A. 6 n.4 and A.9; Memorandum and Order, July 25, 1991 (Keeton, J.), at B. 6 ("Judge McNaught had numerous concerns about the jury verdict independent from the inconsistency issue"). In fact, Judge McNaught stated that he did not believe petitioner's two primary witnesses. *Cool Light Company, Inc.*, 973 F.2d 31, A.5 n.3 and A.8; Transcript, June 29, 1990 (Findings, McNaught, J.), A. 40 ("If there was a lack of good faith in this case . . . the lack of good faith was best characterized by Mr. Barkley [Petitioner's witness]. . . . I intimated the other day that I didn't believe Mr. Barkley, and I certainly did not. . . . I'm sorry, Mr. Panagiotou [Petitioner's principal], but I didn't believe you, either.").

Petitioner thereafter sought reconsideration from Judge McNaught of his new trial order, which was denied, Order,

August 29, 1990 (McNaught, J.), B. 8; mandamus from the Court of Appeals, which was denied, Order of Court, October 22, 1990 (First Circuit), B. 9 through B. 10; and, after Judge McNaught's retirement and reassignment of the case to Judge Keeton, reconsideration of the new trial order from Judge Keeton, which was denied, Memorandum and Order, July 25, 1991 (Keeton, J.), B. 3 through B. 7.

Next, Petitioner strategically chose to waive its right to a jury in the retrial, and to waive all but the three claims it had prevailed on before the jury. Opinion, December 11, 1991 (Findings, Keeton, J.), A. 50 through A. 67. At the close of the second trial, Judge Keeton ruled in favor of Respondent on all of Petitioner's claims, for several separate and independent reasons including: failure to prove causation of harm (*Id.* at A. 53 through A. 55), failure to prove breach of contract (*Id.* at A. 55 through A. 60), failure to prove breach of implied duty of good faith and fair dealing (*Id.* at A. 60 through A. 61), failure to prove fraud (*Id.* at A. 61 through A. 64), and failure to prove damages (*Id.* at A. 64 through A. 67).[3] Indeed, Judge Keeton noted that the lack of specificity of Petitioner's fraud claim was so acute that the claim would not have survived a motion to dismiss under Fed. R. Civ. P. 9(b). Transcript, October 31, 1991 (Findings, Keeton, J.), B. 3 through B. 7. Though having the opportunity to do so, Petitioner chose not to appeal Judge Keeton's findings and they are now the law of the case.

Petitioner appealed to the First Circuit on only two issues: (1) whether Judge McNaught acted properly in ordering a new trial; and (2) whether Judge McNaught acted properly in ruling against Petitioner on one of its bench-tried claims. *Cool Light Company, Inc.*, 973 F.2d 31, A. 4 through A. 5 n.4 and A. 5

[3] Contrary to Petitioner's assertion, the true bases for Judge Keeton's findings are not an "idiosyncratic" market theory, petition at 7-8 n.12, but the explicit, independent and cumulative findings referenced herein.

(text). The First Circuit affirmed, dismissing the latter contention in a footnote and upholding the new trial order, ruling:

> We are mindful of [Petitioner's] Seventh Amendment concerns in vacating a jury verdict. Yet there exists no violation of Seventh Amendment rights where a trial judge exercises his lawful discretion in awarding a new trial where speculation and confusion are manifest in not only the verdict but the evidentiary record itself.
>
> . . .
>
> [Petitioner] was given a second trial before a highly competent and fair-minded judge. His thorough analysis in finding plaintiff's failure of proof is totally justified by the record. We are convinced from our own review of the record that Judge McNaught's grant of a new trial was not a miscarriage of justice.

Id. at A. 10. The Court of Appeals subsequently denied Petitioner's motion for rehearing or rehearing *en banc*. Order of Court, October 15, 1993 (First Circuit), A. 30 through A. 31.[4]

Argument.

It Would Be Improvident to Grant Certiorari as Petitioner Is Not Entitled to Any Further or Different Relief Below Even If It Could Prevail on the Merits of Its Argument to This Court.

> While this Court decides questions of public importance, it decides them in the context of meaningful

[4] Petitioner recently filed a motion with the district court pursuant to Fed. R. Civ. P. 60 to overturn Judge McNaught's new-trial decision. As this motion is still pending, the instant certiorari petition may be untimely and may lead to multiple, successive petitions for certiorari.

> litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.

The Monrosa v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959). The Court has recognized that when the resolution of a legal issue is irrelevant to the ultimate outcome of the case, as it is here, certiorari should be denied. *See, e.g., New York* v. *Uplinger*, 467 U.S. 246 (1984) (writ of certiorari dismissed as improvidently granted where federal question not clearly framed and challenged decision based on other decision from which review not sought); *Belcher* v. *Stengel*, 429 U.S. 118 (1976) (writ of certiorari dismissed as improvidently granted where full briefing and oral argument demonstrated additional grounds supporting lower court decision beyond basis challenged in petition for certiorari); *National Labor Relations Board* v. *Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477, 491 n.16 (1960) (certiorari should be denied where litigation is not meaningful to the parties); R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, § 4.4, pages 201-202 (6th Ed. 1986) (citing *Somerville* v. *United States*, 376 U.S. 909 (1964), as case where certiorari denied because resolution of the conflict would not change result reached below). *Cf. Muskrat* v. *United States*, 219 U.S. 346 (1911) (Court will not issue advisory opinions).

The issue raised by Petitioner is the propriety of the granting of the motion for a new trial on those counts of a multi-count complaint which were tried to a jury. The new trial has been had — on terms and conditions dictated by Petitioner, including a waiver of jury at the second trial — and Petitioner lost. Opinion, December 11, 1991 (Findings, Keeton, J.), A. 50 through A. 67. Petitioner strategically chose not to appeal any of the findings or rulings made by Judge Keeton in the second trial. *See, Cool Light Company, Inc.*, 973 F.2d 31, A. 2 through A. 10.

A. *A Separate and Unchallenged Basis Exists Which Supports the Contested Decision.*

Petitioner is not entitled to any relief. Petitioner asserts in its petition that Judge McNaught's decision was based solely on verdict inconsistency and that his decision to order a new trial was pursuant to Rule 49 of the Federal Rules of Civil Procedure. Petition at 6. Petitioner then asks the Court to find that a new trial should not have been granted under Rule 49 and to reinstate the jury verdicts. Yet, Petitioner ignores the fact that the jury verdicts were against the clear weight of the evidence and revealed the jurors' total confusion, that this supported Judge McNaught's decision, and that both the First Circuit and Judge Keeton so found. *Cool Light Company, Inc.*, 973 F.2d 31, A. 6 n.4 ("[a]s Judge Keeton observed, however, Judge McNaught did not base his grant of a new trial solely on the inconsistency of the special interrogatories and the general verdict"), *id.* at A. 9 (noting *all* of Judge McNaught's reasons for ordering a new trial including concerns apart from the inconsistency issue); Memorandum and Order, July 25, 1991 (Keeton, J.), B. 3 through B. 7.

Therefore, even if Petitioner could prevail in demonstrating to this Court that the inconsistency of the jury verdicts did not require a new trial, it is not entitled to reinstatement of the jury verdicts as a separate and independent basis exists for the new trial order which has been confirmed by a second trial before a second judge. *Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937) ("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."); *Jackson* v. *Southern California Gas Co.*, 881 F.2d 638, 643 (9th Cir. 1989) (correct lower court decision may be affirmed on any grounds, and must be affirmed even if district court relied on wrong grounds or reasoning); *Klingman* v. *Levinson*, 877 F.2d 1357, 1360 n.3 (7th Cir.

1989) (reviewing court can affirm judgment on any ground which is supported by a factual basis for doing so in the record); *Knight* v. *Mills*, 836 F.2d 659, 661 (1st Cir. 1987) (appellate court should affirm correct decision of lower court even when lower court decision is based on inappropriate ground); *Railway Labor Executives' Ass'n* v. *Staten Island R. Corp.*, 792 F.2d 7, 12 (2d Cir. 1986) (appellate court may affirm lower court decision on any basis which finds sufficient factual support in the record), *cert. denied*, 479 U.S. 1054 (1987); *Hatch* v. *Reliance Ins. Co.*, 758 F.2d 409, 414 (9th Cir.) (Court of Appeals may affirm lower court decision based on any grounds supported by the record), *cert. denied*, 474 U.S. 1021 (1985).

Judge McNaught's decision was confirmed by the results of the retrial in which Judge Keeton, who had before him virtually the entire transcript of testimony from the first trial and also heard live testimony, independently found that Petitioner's case was fatally flawed by numerous defects. *Cool Light Company, Inc.*, 973 F.2d 31, A. 10 (Judge Keeton's decision after the second trial in finding Petitioner's failure of proof is totally justified by the record); Transcript, October 31, 1991 (Findings, Keeton, J.), B. 11 through B. 21; Opinion, December 11, 1991 (Findings, Keeton, J.), A. 50 through A. 67. Judge Keeton's decision has not been appealed from and is now the law of the case. *See generally Christianson* v. *Colt Industries Operating Corp.*, 486 U.S. 800, 815-816 (1988) (approving law of the case doctrine); *Lacy* v. *Gardino*, 791 F.2d 980, 984 (1st Cir.) (law of the case doctrine makes binding upon court a ruling by a court of the same or higher level made during prior stages of the same litigation), *cert. denied*, 479 U.S. 888 (1986); *Williamsburg Wax Museum, Inc.*, v. *Historic Figures, Inc.*, 810 F.2d 243, 250 (D.C. Cir. 1987) (law of the case doctrine requires that legal decision made at one stage of litigation which is unchallenged in subsequent appeal when opportunity to do so existed becomes law

of the case for future stages of same litigation and parties are deemed to have waived right to challenge that decision at later time); *Laffey* v. *Northwest Airlines, Inc.*, 740 F.2d 1071, 1089-1090 and 1102-1103 (D.C. Cir. 1984) (unappealed lower court decisions are law of the case in proceedings after remand), *cert. denied*, 469 U.S. 1181 (1985); *Munoz* v. *Imperial County*, 667 F.2d 811, 817 (9th Cir.) (same), *cert. denied*, 459 U.S. 825 (1982); *Fogel* v. *Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."), *cert. denied*, 459 U.S. 828 (1982); J. Moore, J. Lucas & T. Currier, 1B Moore's Federal Practice, § 0.404[1] and [4.-3] (1992). In short, Judge Keeton's decision that Petitioner has no case, unappealed by Petitioner and respected by the Court of Appeals, would be binding were this case remanded.

B. *The Court Should Not Reinstate the Jury Verdicts Because Either: (a) the Lower Courts Have Found that the Jury Verdicts are Against the Clear Weight of the Evidence and Demonstrate Juror Confusion; or (b) Respondent is Entitled to But Has Not Yet Received a Ruling By the Trial Court on Its Motion to Set Aside the Jury Verdicts As Against the Clear Weight of the Evidence.*

Petitioner seeks to avoid the fact that the new trial order is supported by the clear weight of the evidence by arguing that Judge McNaught's decision was not related to Respondent's then-pending motion for a new trial based on the weight of the evidence, but solely on Judge McNaught's concerns, raised *sua sponte*, about inconsistencies in the jury verdicts. Indeed, Petitioner argues that Judge McNaught never acted on Respondent's motion. Petition at 6 ("apart from his concern over the calculation and apportionment of compensatory damages,

Judge McNaught *never ruled on any other ground* [when ordering the new trial]") (emphasis supplied). Petitioner's argument proves too much.[5]

Clearly, Respondent is entitled to have a ruling on its motion for a new trial at some point. Fed. R. Civ. P. 50 and 59. The only one who could make such a determination is the judge who presided over the trial and was thereby able to observe the demeanor and testimony of live witnesses: Judge McNaught. *See Marshall* v. *Lonberger*, 459 U.S. 422, 434 (1983) (reviewing courts not in a position "to redetermine credibility of witnesses whose demeanor has been observed by the [] trial court."); *United States* v. *Oregon Medical Society*, 343 U.S. 326, 339 (1952) (" 'Face to face with living witnesses [the trial judge] holds a position of advantage from which appellate judges are excluded. . . . [T]he exercise of his power of observation often proves the most accurate method of ascertaining the truth. . . . How can we say the judge is wrong? We never saw the witnesses. . . . To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' ") (citation omitted). As Judge McNaught is now retired, this case cannot be remanded to him for a further determination as to whether or not the jury verdicts were against the clear weight of the evidence.

The only practical way of protecting Respondent's right to move for a new trial would be to conduct a second trial to determine whether Petitioner's claims are valid. In this case, the second trial has already occurred and Judge Keeton has ruled that, for numerous reasons, Petitioner cannot prevail on its claims. As noted above, Petitioner did not appeal Judge

[5] Respondent believes Judge McNaught, who openly stated his finding that Petitioner's two key witnesses were unbelievable and ruled against Petitioner on all bench-tried claims, has already determined that the jury verdicts were against the clear weight of the evidence. However, for the purposes of this section B only, Respondent will accept Petitioner's contrary assertion.

Keeton's findings that it has no case and such findings are now the law of the case. A *third* trial would be futile as the law of the case doctrine would prevent recovery by Petitioner. *See Williamsburg Wax Museum*, 810 F.2d at 250 (trial court decision which is unchallenged in subsequent appeal when opportunity to do so existed becomes law of the case, binding in subsequent stages of same action); *Laffey*, 740 F.2d at 1089-1090 and 1102-1103 (same); *Munoz*, 667 F.2d at 817 (same); *Fogel*, 668 F.2d at 109 (same). Therefore, Petitioner is entitled to no further relief from this Court. Further, Respondent has a right to have addressed its contention that punitive damages under California law cannot be awarded as California law does not apply.

In short, Petitioner is hoist on its own petard: either the decision to order a new trial from which Petitioner seeks relief is supported by the independent, unchallenged basis that the verdicts were against the clear weight of the evidence, or Respondent's motion for a new trial is still pending and, due to the peculiar posture of this case, can only be resolved by a second trial. Since that second trial has already occurred, and Petitioner did not appeal from its judgment, this case is over.

C. *The Court Should Not Reinstate Demonstrably Erroneous Jury Verdicts.*

Finally, in the guise of adjusting differences among circuits, it would be fundamentally unjust to reinstate jury verdicts which two federal judges have independently found to be demonstrably wrong. *See Cool Light Company, Inc.*, 973 F.2d 31, A. 2 through A. 10; ("[Judge Keeton's] thorough analysis in finding [Petitioner's] failure of proof is totally justified by the record"]; Transcript, October 31, 1991 (Findings, Keeton, J.), B. 11 through B. 21; Opinion, December 11, 1991 (Findings, Keeton, J.), A. 50 through A. 67; Transcript, June 29,

1990 (Findings, McNaught, J.), A. 39 through A. 43; Memorandum and Order, August 9, 1990 (McNaught, J.), A. 21 through A. 24.

Conclusion.

It would be improvident to grant a writ of certiorari in a case, such as this, in which no further relief can be granted to the Petitioner because it has already received all the relief available. The petition should be denied.

Respectfully submitted,

ALLAN VAN GESTEL
(Counsel of Record)
JOHN B. DAUKAS
GOODWIN, PROCTER & HOAR
Exchange Place
Boston, Massachusetts 02109-2881
(617) 570-1000
Counsel for Respondent

B.1

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COOL LIGHT COMPANY, INC.,
Plaintiff,

v.

CIVIL ACTION
No. 86-2669-MC

GTE PRODUCTS CORPORATION,
Defendant.

July 26, 1990

DEFENDANT GTE PRODUCTS CORPORATION'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, MOTIONS FOR NEW TRIAL AND REMITTITUR

Defendant GTE Products Corporation ("GTE") respectfully moves this Court, pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, to have the vedict and any judgment entered thereon set aside and to enter judgment in its favor. Judgment notwithstanding the verdict should be entered in favor of GTE because: (1) plaintiff Cool Light Company, Inc. ("Cool Light") failed to introduce sufficient evidence to submit the fraud claim to the jury; (2) Cool Light's claim of punitive damages should not have been submitted to the jury since Massachusetts and not California law governs this action; and, (3) there was insufficient evidence to submit the claims of breach of contract and breach of implied covenant of good faith and fair dealing to the jury.

In the alternative, GTE moves this Court, pursuant to Rules 50(b) and 59 of the Federal Rules of Civil Procedure, to vacate

any judgment entered upon the verdict and grant a new trial for the reasons that the verdict was against the clear weight of the evidence, the verdict was excessive, the jury returned multiple awards for the same claimed injury, and the Court erred in refusing to give certain instructions requested by GTE with respect to damages. Further, in the event that this Court allows the verdict to stand, GTE moves this Court, pursuant to Rule 50(b), to order a remittitur.

GTE submits a memorandum of law in support of these motions.

Respectfully submitted,

DEFENDANT,

GTE PRODUCTS CORPORATION,

_____

Charles Donelan (BBO #129340)
Ann L. Palmieri (BBO #388090)
Day, Berry & Howard
260 Franklin Street
Boston, MA 02110-3109
(617) 345-4600

CERTIFICATE OF SERVICE

I hereby certify that on this day a true copy of the above document was served by hand upon the following:

Edwin A. McCabe, Esq.
1111 Beacon Street
Brookline, MA 02146

Sydelle Pittas, Esq.
Gaston & Snow
One Federal Street
Boston, MA 02110

Date: _____

_____
Ann L. Palmieri

B.3

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COOL LIGHT COMPANY, INC.,
Plaintiff,

v.

GTE PRODUCTS CORPORATION,
Defendant.

CIVIL ACTION
No. 86-2668-K

Memorandum and Order
July 25, 1991

Now before the court is Plaintiff's Renewed Motion for Reconsideration (Docket No. 175, filed May 15, 1991) along with a supporting memorandum (Docket No. 176, filed May 15, 1991) and defendants opposition (Docket No. 177, filed May 29, 1991).

I.

This case was originally tried before Judge McNaught and a jury in June 1990. After the trial, Judge McNaught was troubled by many aspects of the jury's verdict, including the possibility that multiple damages were awarded for the same injury and the further possibility that there was an inconsistency between the jury's general verdict in favor of plaintiff on three counts of plaintiff's complaint and its response to a special interrogatory. As a result of his concerns, Judge McNaught ordered a new trial on all counts that had been tried to the jury. This case was randomly reassigned upon Judge

McNaught's retirement, and it has been set for retrial on October 15, 1991.

After reviewing the submissions and the record relating to Judge McNaught's issuance of the new trial order, I conclude that plaintiff has not made a sufficient showing that Judge McNaught abused his discretion in ordering a new trial. Thus, I will not vacate the order for new trial, and plaintiff's motion for reconsideration will be denied.

II.

The facts underlying plaintiff's motion for reconsideration are not in dispute. After the presentation of evidence at trial, the jury returned a general verdict in favor of plaintiff on Count VI (fraud), Count XI (contract) and Count XII (violation of duty of good faith) in which it assessed compensatory damages against defendant of $2,950,000 on Count VI, $3,694,00 on Count XI and $2,800,000 on Count XII. The jury awarded plaintiff a total of $9,450,000 on Count VI, but in response to an oral special interrogatory, the jury stated that $6,500,000 of that figure was an award of punitive damages under California law. Thus, the jury awarded plaintiff a total of $15,944,000 in damages on Counts VI, XI and XII, $9,444,000 of which was an award of compensatory damages.

On August 2, 1990, a post-trial conference was held for the purpose of moving toward entry of final judgment. At the conference, Judge McNaught expressed concern that the jury's $9,444,000 award of compensatory damages on its general verdict did not square with its answer to special interrogatory number 14 in which it stated that plaintiff had suffered a total of $9,300,000 in lost profits as a result of defendant's conduct. Plaintiff argued that the $144,000 discrepancy between the total amount of compensatory damages awarded by the jury and its calculation of total lost profits represented additional

compensatory damages, other than lost profits, awarded by the jury on Count XI (the contract claim). Judge McNaught also stated at the August 2, 1990 conference that he was concerned that the jury might have awarded multiple damages for the same harm, and that he had difficulty understanding how the jury could have awarded different damage amounts for Counts VI, XI, and XII for what he viewed to be essentially the same harm.

At the August 2, 1990 conference, Judge McNaught also heard argument on defendant's motion for judgment notwithstanding the verdict and, in the alternative, for a new trial (Docket No. 157, filed July 26, 1991). The stated grounds for the motion for judgment notwithstanding the verdict were that there was insufficient evidence to support the jury verdict and that the punitive damages awarded was not permitted under Massachusetts law, the law that defendant contends governs the case. The grounds for the alternative motion for new trial were: (1) that the court omitted a necessary instruction regarding damages; (2) that the verdict was against the clear weight of the evidence; (3) that the damages awarded were excessive; and (4) that plaintiff was awarded multiple damages for the same injury. Defendant never asserted, either at trial or in the motion for judgment notwithstanding the verdict and for a new trial, that there was an inconsistency between the general verdict and the jury's response to special interrogatory number 14.

On August 9, 1990, Judge McNaught issued a Memorandum and Order in which he ordered a new trial on all counts tried to the jury. The Memorandum and Order does not explicitly state the specific ground for the order of new trial, but it is evident that Judge McNaught was troubled by numerous aspects of the jury verdict:

> I considered granting judgment *non obstante veredicto* on one or more of the counts of the complaint

> which were given to the jury for determination, and decided against it, since, if a new trial is granted, new evidence might be offered. There is also the fact that even if I act in that fashion, we are still left to speculate concerning the award of damages, the source of the amounts decided upon by the jury, and the possibilities that the jury came up with inconsistent amounts, or amounts that were divided among the counts improperly.
>
> In sum, one must speculate in order to assess the work of the jury.

August 9, 1990 Memorandum and Order at pp. 4-5.

III.

Both parties have focused in their memoranda solely on Judge McNaught's consideration of the issue of the inconsistency between the general verdict and special interrogatory number 14 in making their arguments with respect to the propriety of the order for new trial. However, my review of the August 9, 1990 Memorandum and Order reveals that this focus is misplaced; Judge McNaught had numerous concerns about the jury verdict independent from the inconsistency issue. Thus, even if I assume that there was an inconsistency between the general verdict and the jury's response to special interrogatory number 14, and if I further assume that Judge McNaught would have been procedurally precluded from ordering a new trial based solely on the foregoing inconsistency because defendant failed to object to the inconsistency before the discharge of the jury, *see Fernandez* v. *Chardon*, 681 F.2d 42, 58 (1st Cir. 1982), *aff'd on other grounds sub nom.*, *Chardon* v. *Fumero Soto*, 462 U.S. 650 (1983) ("objections to the inconsistency of verdicts must be made before the jury is dis-

charged or by motion to resubmit to the jury"), I nevertheless conclude that the order for new trial should not be vacated. Plaintiff has made no showing that Judge McNaught abused his discretion by ordering a new trial in light of his concerns about the verdict apart from the inconsistency issue. *See MacQuarrie* v. *Howard Johnson Company*, 877 F.2d 126, 131 (1st Cir. 1989) ("trial courts have wide discretion when considering a motion for a new trial"). In the absence of any showing that Judge McNaught's order for new trial was a clearly erroneous exercise of his discretion — taking into consideration *all* of his expressed reasons for ordering the new trial — the order for new trial will not be vacated, and plaintiff's motion for reconsideration will be denied. *See Lacy* v. *Gardino*, 791 F.2d 980, 985 (1st Cir.), *cert. denied*, 479 U.S. 888 (1986) (law of the case doctrine ordinarily prevents reconsideration of an earlier ruling in a case unless that ruling is clearly erroneous).

ORDER

For the foregoing reasons, it is ORDERED:

Plaintiff's Renewed Motion for Reconsideration (Docket No. 175) is denied.

_____

United States District Judge

B.8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

COOL LIGHT COMPANY, INC.,
Plaintiff,

v.

GTE PRODUCTS CORPORATION,
Defendant.

Civil Action No. 86-2668-Mc

BBO #327040
BBO #552245
BBO #400780

PLAINTIFF'S MOTION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE, FOR REDUCTION
IN AMOUNT OF COMPENSATORY DAMAGES

Plaintiff, Cool Light Company, Inc. ("Cool Light"), hereby moves for reconsideration of this Court's Memorandum and Order on Proposed Orders of Judgment and on Motion for Judgment N.O.V. dated August 9, 1990. In support of its Motion, Cool Light relies on the unanimous jury verdict of June 29, 1990, the jury's answers to specific Interrogatories propounded by the Court and the accompanying statement of points and authorities.

Edwin A. McCabe
Suzanne E. MacPherson
McCABE & ASSOCIATES
1111 Beacon Street
Brookline, MA 02146

Sydelle Pittas
GASTON & SNOW
One Federal Street
Boston, MA 02110

DATED: August 20, 1990

Civil Action 29, 1990 Denied. Mr Nayler, DJ

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 90-1889

IN RE:

COOL LIGHT COMPANY, INC.,
Petitioner,

Before

Breyer, *Chief Judge*,
Campbell and Torruella, *Circuit Judges*.

ORDER OF COURT
Entered October 22, 1990

Before us is a petition for writ of mandamus seeking review of the district court's August 9, 1990 order that a new trial be held in the case of *Cool Light Company, Inc.* v. *GTE Products Corp.*, No. 86-2668-Mc (D.Mass. 1990).

Cool Light has not demonstrated that it will suffer irreparable harm should the district court order stand, and has not proved a clear entitlement to the relief requested. *In re Recticel Foam Corp.*, 859 F.2d 1000, 1005 (1st Cir. 1988). Nor has Cool Light raised any issues of sufficient public concern to warrant the issuance of an extraordinary writ. *In re Bushkin Associates, Inc.*, 864 F.2d 241, 247 (1st Cir. 1989).

An order granting a new trial is interlocutory in nature and therefore not immediately appealable. A litigant is free to seek

review of the propriety of such an order on direct appeal after final judgment has been entered, but such an order will rarely justify the issuance of a writ of mandamus. *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-36 (1980). We see no extraordinary circumstances warranting a departure from this general rule. The petition for writ of mandamus is denied.

By the Court:

Francis P. Scigliano, Clerk.

(cc: Messrs. Pittas, McCabe, van Gestel, Donelan)
(Certified Copy to Judge McNaught, and District Court)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COOL LIGHT COMPANY, INC.,

vs.

GTE PRODUCTS CORPORATION

CIVIL ACTION
No. 86-2668-K

Courtroom 11
Thursday, October 31, 1991
Boston, Massachusetts

NON-JURY TRIAL PROCEEDINGS
DAY 5

BEFORE THE HONORABLE ROBERT E. KEETON
UNITED STATES DISTRICT JUDGE

For the Plaintiff:
THE McCABE GROUP
By: Edwin A. McCabe, Esquire
Joseph P. Davis, III, Esquire
25 First Street
Cambridge, Massachusetts 02141-1810

For the Defendant:
GOODWIN, PROCTER & HOAR
By: Allan van Gestel, Esquire
Marie P. Buckley, Esquire
John B. Daukas, Esquire
Exchange Place
Boston, Massachusetts 02109-2881

Court Reporter:
Timothy J. Willette, RPR-CM
Official Court Reporter
U.S. District Court
1201 USPO & Courthouse
Boston, Massachusetts 02109
(617) 248-0604

[V-64] one 31-A.

MR. DAVIS: Okay. And that's the end of the scrivener's list.

Oh, I'm sorry. Also, there were a couple of documents the last time we were together that were entered into evidence; however, we didn't have copies for them to be numbered, so I think with the clerk we can get those numbered. Those are the Hoppert and Hammer exhibits that were entered.

THE COURT: Now, we reserved numbers at the end. Is this the same document —

MR. DAVIS: Those are the ones that we reserved numbers on. I didn't realize they'd been reserved.

THE COURT: Yes, that had been done.

MR. DAVIS: So we have copies of those.

THE COURT: All right. Thank you.

All right. Now, I have some settled views about findings I must make on the evidence in this case on critical issues that are decisive and I will state those findings now and explain them briefly. As I say, I think they are dispositive. I will confer with you after I have stated these findings about whether you wish me to file additional subsidiary findings. I have settled views on a lot of the subsidiary findings as well that I will not state this morning but that are entirely consistent with the **[V-65]** findings that I will state, but I think in order to expedite the disposition of this matter it is sensible for me to state some findings and conclusions which are in my view sufficient under the law to be dispositive of the case. The findings that I will state I will put first in a very general form.

There are two independent reasons as to each of the three claims that are before me in this trial: that is, the fraud claim in Count 6, the contract claim in Count 11, and the breach of the obligation of good faith claim in Count 12. There are two independent reasons that are decisive of each of those claims. The first of those reasons has to do with the requirements of

particularity and specificity not only of the statement of the claim but of the proof to support the claim. The second of those findings has to do with causation requirements, and in this respect I'm not talking about, quote, legal cause, unquote, in some unsophisticated sense that goes beyond the requirements of cause and fact, with quotes around it, as we use that term in law. I'm talking about cause and fact requirements. Now, that means that I must deny each of the claims of the plaintiff in this case for each of these independent reasons. Now let me turn first to the fraud claim and the first of these reasons, the particularity or specificity requirement.

[V-66] In a fraud claim we commonly think of it as involving either four or eight elements, depending on which way you want to state it. If we state it as four, false representation, which of course you can break down into two and thus turn it into eight — one, false representation; two, intent to deceive, which involves an element of scienter and an intent that the representation be relief upon. I'll come back to that one in a moment because there is a qualification of that one that I want to state with respect to this case. Three, detrimental reliance, and four, causing harm.

Now, the particularity requirement goes to the first of those: that is, the false representation, and I'm going to explain in a moment why I think the particularity requirements have not been met either by the claim or by the proof in this case. But before I do that I want to just explain that although the case has been argued to me to a considerable extent by defense counsel on the theory that an intent to deceive is required, I am not resting my decision on that basis. There is a substantial body of law with respect to liability for negligent misrepresentation, which means there is not an intent to deceive requirement, but instead some kind of fault requirement short of intent. And one of the issues I had in mind in saying to you earlier that I needed to have you address the law that sets the

[V-67] standards of liability and the measure of damages here is that the measure of damages may be somewhat different depending on whether we're using a negligent misrepresentation or an intentional misrepresentation standard. But I don't find it necessary to go into those issues, fortunately, in this instance, because the overriding finding that I think I must make on the evidence in this case as fact finder with respect to the false representation requirement moots the other issue with respect to what is the requirement with respect to the standard of fault for knowledge or whether one should at least have known of the false representation.

Now I come back, then, to explaining the specificity and particularity requirement as I think I must apply it here. I've been troubled, as I have explained before, all along by the lack of specificity of the claim of fraud in the documents that came to me for consideration before the trial evidence was presented here. The closest the plaintiff has come to identifying precisely an alleged false representation is phrased in approximately this way, and I'm not exactly quoting: That GTE had represented that it had the capacity to coat reflectors in production quantities with consistent quality in yields. Now, that does not meet the requirements of particularity and specificity, and these requirements are not merely pleadings **[V-68]** requirements but proof requirements as well.

It is true that we have in the Federal Rules of Civil Procedure in Rule 9(b) a pleading requirement, and the wisdom of having such a requirement is demonstrated, I think, by the history of this case. If that requirement had been invoked by the defendant in this case at an early stage, we might have saved all of the parties a lot of litigation costs in a futile exercise, because if no greater specificity than what has been offered to me here at the end of the trial had been offered, the appropriate ruling would have been that doesn't state a claim of fraud. But of course it is not the pleadings requirement I am applying here.

That requirement has been waived by the defendant by not having been asserted in the early stages. So I accept the proposition that if you can at the end of the trial, after all the evidence is before me and through oral argument, formulate for me a proposed finding that I could make on the evidence as to what was the false representation and formulate it in a way that it would meet the requirements of the law as to what is required, then I would accept that and make that finding.

But one thing that really has not been addressed in the submissions before me here is that the law makes a clear distinction between what we call false representation — and we ordinarily mean in that respect **[V-69]** representation of fact — false representation of fact, and I think we might take this alleged representation of capacity as a representation of fact. The law requires a false representation of fact and clearly distinguishes between a false representation of fact and what we commonly refer to in the commercial context as permissible puffing. That's the reason we have the requirement of specificity and particularity, to help us draw that line.

Now, let me return to this proposed specification, the closest it has come in the course of this entire trial, GTE had the capacity to coat reflectors in production quantities with consistent quality in yields. Consistent quality, to have meaning that I can accept and apply or that any other fact finder could accept and apply as a measure of judgment, has to mean — has to identify for me what is that quality. Just consistency doesn't help us. Obviously, it was more than just being consistent. It was to be a quality that would serve some purpose that was of interest to the parties. That quality has not been defined. There is no evidence before me, no oral testimony, no written testimony, no testimony from which I could draw an inference as to what communications occurred that defined that quality. Instead, the evidence before me demonstrates quite clearly that what was going on between the parties was negotiations looking to coming to some understanding of what **[V-70]** that would be.

The closest to a specification here is a specification in terms of the performance, the way it would work, the delivery of the light that it would affect with the transmission of the heat. There was, I think one might say, an understanding between the parties as to what they were aiming for in that respect, but there is no way I can interpret the evidence that is before me as a representation by GTE that: "We will guarantee that it will function in that way." There is no evidence before me that I can interpret it as a representation by GTE that: "We now know that we now have the capacity to do that." Instead, the evidence before me is that there was a period of negotiation and efforts through trial runs and inspections and tests and returns aiming for that process. Plaintiff has argued to me that the false representation was made back at the beginning before that whole process started. There's no way I as fact finder can fairly and reasonably interpret the evidence before me as to the communications as a representation back there before this process of interaction between them started as a warranty, as a representation of fact. "We have that capacity now." Even at this late stage with all the evidence before me, I still do not have a basis for making a finding as to some standard of quality that I would be able to apply in order to determine whether it had been met in **[V-71]** this case.

Now, let me pause at this point to say that that problem of lack of specificity I see also as a problem in two other respects in this case, a problem with respect to the contract claim, both the contract and the good faith claim by the plaintiff, and a problem with respect to the counterclaim. I'll come back to that latter one later. Let me turn now briefly to the application of that requirement of specificity to the contract itself.

We speak of a contract as a, quote, meeting of the minds, unquote. Of course, that's metaphorical, because we're talking about the manifested intent of the parties. We're not talking about what's in their minds unexpressed. We're talking about what they express to each other about what is in their minds.

I am not able to find for the plaintiff on the contract claim for one reason because I am not able to find that the parties had come to a manifested meeting of the minds with respect to this product, with respect to the quality of this product in the sense of its characteristics rather than in the sense of what they were aiming for. And they have not come to a contractual agreement that has settled all of the terms when they have only come to an agreement to move forward with certain relationships between them looking toward the hope on both sides that they would **[V-72]** come to the point that they would have a meeting of minds about the quality in the sense of the characteristics of this product and how it could be made as distinguished from the performance criteria that they were both aiming for in the end. So the lack of specificity and particularity is a fatal flaw in the contract claim as well as the fraud claim, and of course the same thing applies to the good faith claim.

Now let me turn to the completely independent basis for decision. Of course, the findings that I have just made, if they're sustained on appeal, are decisive against the plaintiff's claim by themselves, but there is a second reason that I now turn to that also is independently decisive against each of these claims, and that is the causation question.

As I spoke at first of the various elements of any fraud claim in any jurisdiction — and there's no real choice of law problem here, because this is true in each of the states whose law might be proposed to me for application here — as I spoke of these, I spoke of the last of the four elements, or the seventh and eighth if you want to put it that way, causing harm.

Now, on the causation isue in this case, I am aware that I have before me a lot of quite conflicting evidence with respect to the characteristics and the **[V-73]** performance of Cool Lights compared with various other products that might compete with it in the marketplace; the FAY lights, the HMI, anything else that might come into the marketplace. And counsel spoke in

the course of the argument about wondering about the Court's expertise in sitting here and evaluating how the different products would work in the marketplace. Well, I share that concern, and so the overwhelming evidence for me is not the testimony of the witnesses on one side or the other with respect to this conflict about what are the characteristics of this product in comparison with others that will be competing with it in the marketplace, but what does the marketplace tell us, what does the marketplace tell us.

The most overwhelming evidence before me is the evidence, partly direct but more the circumstantial evidence, that here we are in 1991. I'm being asked to find that the characteristics of the Cool Lights are such that but for the absence of the production by GTE of lights that met the expectations they were aiming for, both parties were aiming for, but for that, Cool Light would now have a major percent of the market and would have had a major percent of the market in the meanwhile. Now, I cannot find that contention credible. There are a number of different ways of looking at it.

The ultimate way of looking at it is the market **[V-74]** tells me otherwise, because Cool Lights do not have a significant position in the market at this moment. And if they were valued by the decision makers in the market as the plaintiff asks me to value them here after hearing evidence about characteristics and so forth, if they were valued by decision makers in the market in that same way that I am being asked to say they are valued, they would have a place in the market today, if not Cool Lights themselves, another product very much like them, because of course if it can be developed by one group, it can be developed by another group. And so if they were as good as McMullen's premises assumed, the marketplace would look different today. Because of the evidence before me as to what the marketplace does show, that is the most probative, the weightiest evidence that I as fact finder credit in determining

as a fact. That even if I assume that the particularity and specificity requirements were satisfied, I still must decide for the defendant on each of the plaintiff's claims because of the requirement of showing that the false representation or the breach of contract or the branch of the obligation of good faith was a cause of the harm that is being alleged. I cannot make that finding. The marketplace tells me otherwise.

Now, I have of course in thinking about these claims considered not only the claim for the total amount, **[V-75]** the valuation of the business at over $40 million as of the time of the alleged breach, but also about the lesser claims for which there have been alleged to be bases here, but I cannot make the causation finding for the plaintiff even as to those lesser claims. One of the subsidiary matters that stands in the way of that is the evidence before me that there was in existence and in Cool Light's possession a quantity of products that functioned as Cool Lights and even that quantity, rather than entering and serving in that most effective part of the marketplace in the evidence before me, the rental market, was not used in that way. I don't draw inferences from that that it was a management problem, that it was a resource problem. I draw inferences from that more weightily that it was a market problem of the competition out there in the marketplace and the market itself, of the people who are the pragmatic users and judges of the qualities of this and all of the competing products expressing their views collectively through the market so that Cool Light could not even capture that part of the market that might have been available to them in the short window of time before competitive products became more effective in the competition of the marketplace.

Now, those are brief explanations of the overriding ultimate fact findings that make it necessary for me to decide the claims against the plaintiff. You've asked **[V-76]** me for a great number of subsidiary findings on details. I'm not sure it's useful

to do that, but I'll come back in a moment to confer with you about whether the parties wish to request me to do that, which I would not do today but instead do by further findings in writing.

I come finally to speak of the counterclaim. I find that there were returns of product for which a part at least of the counterclaim is made and that GTE at least acquiesced in those returns. And borrowing the phrase from counsel's argument which caught my attention at the time, I have not been able to find in the evidence before me hard evidence as to how I could calculate what if any somewhat smaller counterclaim is supported by the evidence before me. And there are circumstances in which the reasonable certainty of damages requirement may be satisfied by a court or a jury making a finding that there is reasonable certainty at least up to this level even though there might have been some greater damage unspecified and cannot be quantified in the way necessary. As I've tried to do that in this case as I've thought about it and wondered if I might get some help in doing it in the arguments today, I haven't been able to identify the hard evidence from which I could draw a reasoned inference.

Now, you see, it is not appropriate for — this is not a thing like pain and suffering that we put to the **[V-77]** jury without reasoned measure. This is a matter on which a fact finding by a court or jury is supposed to be a reasoned finding, reasoned from evidence, and I am not able to make that finding. And so I think it's simply the question of the burden of proof, that having found that the parties were working towards something they had not yet achieved as to specificity of what the product would be and how it would be made that there was a process of billing and returns and credits, I am not able to calculate a measure of damages, if any. I am not even able to say with assurance that I can find that the quality of what was delivered and not returned and not rejected would support some dollar

figure for a counterclaim. So, for that reason it's my view that I should also decide that the counterclaim is not proved.

Now, those are the findings that I will state today. We need to confer about how we proceed to ultimate disposition of the case, the form of judgment. I suspect that we may need not simply to have a judgment entered that recites all claims of the plaintiffs are denied and all counterclaims by the defendants are denied. You may want something more than that in this final judgment. It must be a recitation of disposition of all of the claims and counterclaims in order to be a final judgment. We don't want to turn into the problem of entering something here that the Court of Appeals then tells us we've got to enter **[V-78]** another order, and of course it has to be entered separately.

What do you wish to do? Do you wish to confer about the form of final judgment and either submit it to me jointly if you can or submit your respective proposals, or do you want to set another conference date to confer about it?

MR. MCCABE: I would think that particularly if we can do so soon to set another date would make sense. Certainly, Mr. van Gestel and I will talk about the form of judgment to be entered, but there is also this issue of further subsidiary findings and so forth. We don't want to be in a position of asking the Court to do things that would be unnecessary. By the same token, obviously, we have one or two reactions to what we just heard. So, I think if we could perhaps have a short conference sometime in the near future, that would be useful.

THE COURT: All right. Excuse me for a moment. I think I'll get the calendar.

[PAUSE.]

THE COURT: Let me suggest 3:30 on Tuesdasy, November 12.

MR. MCCABE: That's acceptable. That's fine, your Honor.

MR. VAN GESTEL: Yes.